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Supreme Court of the United States

OCTOBER TERM, 1973.

No. 73-235

MARCO DE FUNIS, *et al., Petitioners,*

v.

CHARLES ODEGAARD, *et al., Respondents.*

BRIEF OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AMICUS CURIAE IN SUPPORT OF THE DECISION BELOW

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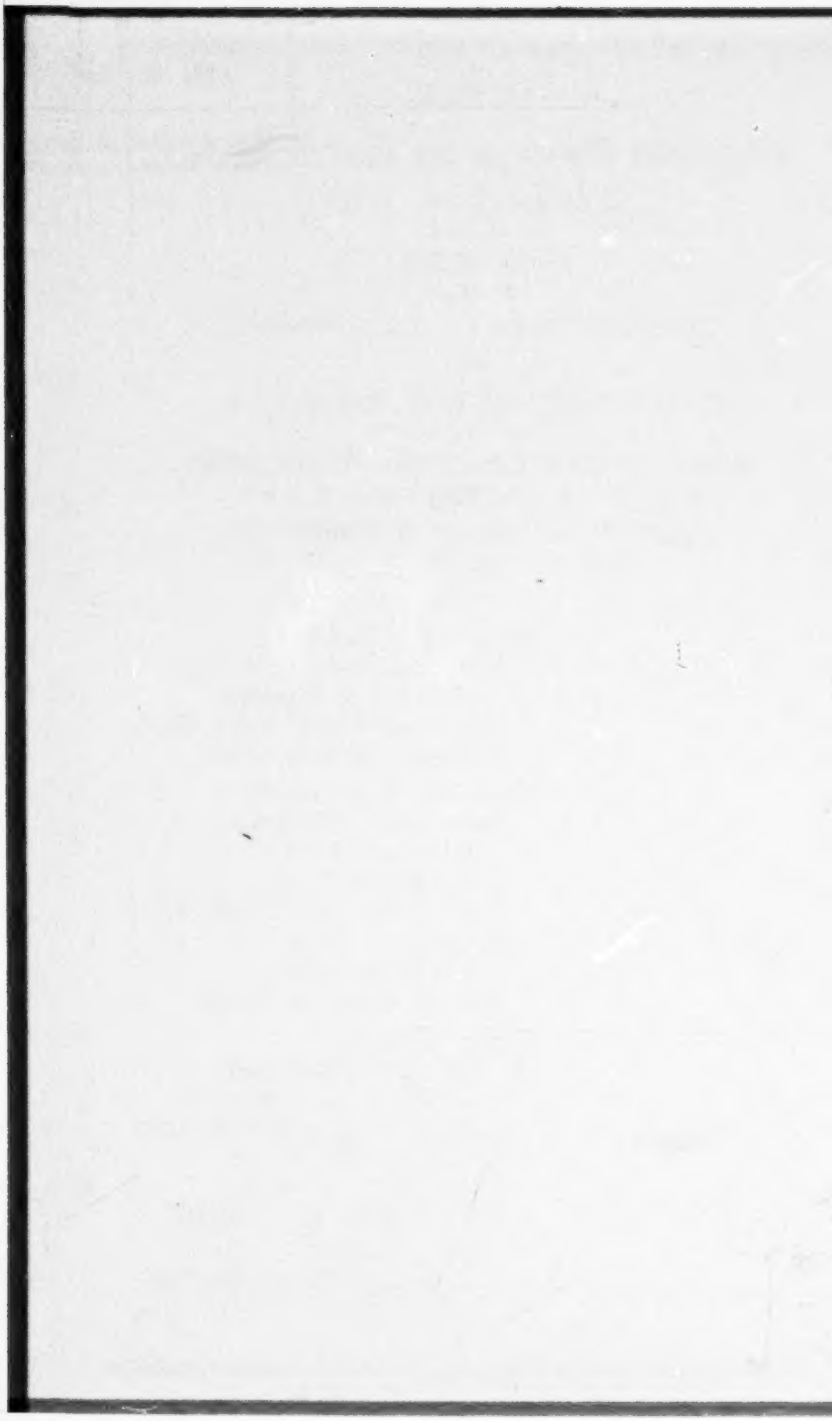

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OPINION BELOW

The opinion of the Supreme Court of Washington is reported at 82 Wn.2d 11, 570 P.2d 1169, and is reprinted as Appendix A to the Petition for a Writ of Certiorari.

JURISDICTION

Certiorari was granted November 19, 1973, and this case is before the Court under 28 U.S.C. § 1257(3).

CONSENT OF THE PARTIES

The Lawyers' Committee for Civil Rights Under Law files this brief with the consent of both parties whose letters of consent have been filed with the Clerk.

QUESTION PRESENTED

Whether applications for admission to a state law school filed by individuals of a recognized "minority" race can be reviewed by a special admissions process designed: (1) to identify qualified applicants whose qualifications could not be accurately assessed without such a special procedure; and (2) to ameliorate the continuing effects of past racial discrimination by obtaining a law school student body of qualified "minority" and "majority" students?

INTEREST OF AMICUS CURIAE

The Lawyers' Committee for Civil Rights Under Law was organized on June 21, 1963, following a conference of lawyers called at the White House by President John F. Kennedy. It is a nonprofit private corporation whose principal purpose is to involve private lawyers throughout the country in the struggle to assure all citizens of their civil rights. The membership of the Committee includes eleven past presidents of the American Bar Association and three former Attorneys General. The Committee filed a brief and argued in this Court as an *amicus* in *Alexander* v. *Holmes County Board of Education,* 396 U.S. 19 (1969).

The Committee, being composed of lawyers, is particularly concerned with civil rights issues involving legal education. The Committee's "Retained Lawyer Program," designed to assist black lawyers establish

legal practices in Mississippi, is based on the Committee's belief that adequate legal services for minorities can be assured in the long run only by increasing the number of minority lawyers in the legal profession. Because we believe the issue in this case is of critical importance to achieving such racial equality in legal education and of far-reaching significance to the entire civil rights effort, the Committee files this brief in support of the decision below.

INTRODUCTORY STATEMENT

Petitioner Marco DeFunis, Jr., twice applied for admission to the University of Washington Law School and was twice denied such admission. Following the second denial, and prior to the commencement of classes in September of 1971, DeFunis, his wife and his parents filed suit in the Superior Court of Washington seeking an order compelling his admission.[1] Petitioners' complaint claimed only that the law school unlawfully admitted students who were "not residents and taxpayers of the state of Washington" as well as "many candidates whose qualifications and credentials [were] much below the credentials and qualifications of" DeFunis (App. 14-15).[2] The complaint set forth in detail DeFunis' admirable undergraduate and graduate scholastic records, academic honors, and high ranking on the Law School Admission Test ("LSAT"). The complaint predicted that DeFunis would perform in law

[1] DeFunis had been admitted to four other law schools, but preferred to attend the University of Washington.

[2] "App." refers to the Single Appendix filed in this Court; "R." refers to the full record filed with the Clerk, "Pet. App." refers to the Appendix to the Petition for Certiorari.

school "as an honor student." (App. 15). Thus, this case was initiated on a theory that admissions to law school must be strictly and mechanically governed by ranking applicants on the basis of grade-point averages and LSAT scores. The complaint did not allege the existence of racial discrimination.

The racial issue now before this Court arose at the trial of this case when it developed that the law school had adopted a special admissions program to identify qualified applicants of recognized "minority" ethnic background. Applications of such minority individuals, *i.e.*, Black Americans, Chicano Americans, American Indians, and Philippine Americans, were given special consideration by admissions officers believed specially qualified to evaluate the potential success in law school of such applicants. All files of Black applicants—regardless of the applicant's "Predicted First Year Average" (PFYA)[3]—were reviewed initially by both a law professor who had served as director of the school's summer training program for disadvantaged prospective law students and a second-year Black law student who had served earlier "as director of the Governor's Multi-Service Center in Seattle, a job involving considerable personnel evaluation." (82 Wn. 2d—, 570 P.2d 1175; Pet. App. A-10). These two individuals were selected, according to the admissions chairman, because their experience made them "best . . . able to assist the committee in the interpretation of those files." (R. 00509). Applications of all Chicanos, American Indians, and Philippine Americans were reviewed by an associate dean of the law school. All minority

[3] This figure is a mathematic calculation based on pre-law school grades and LSAT scores.

applications were later considered by the full admissions committee, which was the only body that could extend an offer of admission. Minority applications were evaluated as a group and not compared directly with non-minority applications. (R. 00457-9)

Applications of non-minority individuals with a PFYA of 74.5 or greater were also in all cases considered by the full admissions committee. Applications of non-minority individuals with PFYA's below 74.5 were reviewed initially only by the chairman of the committee who would refer them to the full committee or reject them himself. As a general rule applications with a PFYA of 77 or above were considered by the full committee immediately upon receipt of all necessary papers, while those below 77—as well as several above 77—were deferred for later consideration at the same time as those between 74.5 and 77 and those below 74.5 which had been referred to the full committee by the chairman—a referral option which he exercised frequently. (R. 00448) Thus, regardless of PFYA, *no* applicant was automatically accepted (R. 00363) and seven to twelve with PFYA's above 77 were in fact rejected. (R. 00449; App. 34) [4]

The trial court concluded that the different procedures employed in evaluating minority applicants

[4] It is important to note that the minority admissions program did not operate so as to impose a substantial or unreasonable burden on the majority "white" class. The admissions process resulted in the acceptance of 37 "minority" students out of more than 275 total acceptances, while 18 of the approximately 145 students who actually enrolled were "minority" individuals (App. 37-46; Def. Ex. 44, p. 27). Thus, approximately 13.4% of the applicants accepted and 12% of students entering were "minority" individuals. If Asian students are considered as part of the "minority" class, the percentages increase to 15% of students admitted and 15% of actual enrollees who were "minority" individuals.

constituted a denial of equal protection of the laws in violation of the Fourteenth Amendment (App. 54). That Court further found "[t]hat some minority students were admitted . . . prior to and instead of [DeFunis] with college grades and aptitude test scores [PFYA's] so low that had they been white, their applications would have been summarily denied." (Finding XXIII, App. 53). This finding was made despite the fact that the record shows unequivocally that *no* applicant—regardless of race—was summarily rejected on the basis of low PFYA's. Every application, regardless of race and regardless of PFYA, was reviewed individually by at least one member of the admissions committee. Indeed, at least ten of the non-minority applicants with PFYA's below 74.5 were actually admitted to the law school following full-committee review. (App. 37-46). And approximately fifty applications of non-minority applicants with PFYA's below 74.5 were reviewed by the full committee following screening by the chairman. (R. 00028). The record is thus clear that there was no threshhold PFYA below which a non-minority applicant was summarily rejected. PFYA's were used to *screen* applications, but admission or rejection depended on whether or not the applicant was judged "capable of successfully completing the law school program" and able "to make significant contributions to law school classes and the community at large." (82 Wn.2d—, 570 P.2d 1176; Pet. App. A-10, 12). The admissions officials saw PFYA's as only one factor in a determination of "qualifications"; the trial court equated "qualifications" with PFYA's alone. (R. 00553-561).

Although different procedures were utilized to screen minority and non-minority applicants, the standard of

admissions applicable to all was the likelihood of success in law school. As the chairman of the admissions committee testified:

> "Our attempt, throughout, is to assess the relative probability of the individual's succeeding in law school, that criterion was applied to these [minority] applicants, as well as it had been to the other applicants. They were simply not directly compared. We sought, within the minority category, those persons who we thought had the highest probability of success in law school." R. 00459.

The trial court ordered the law school to admit DeFunis in September of 1971. Although the Washington Supreme Court later reversed that order in March of 1973, DeFunis has continued his legal education at Washington without interruption by virtue of a stay granted by Mr. Justice Douglas on June 5, 1973. Assuming continued satisfactory progress, DeFunis will graduate in June 1974.

Some of the briefs filed in this Court have sought to portray this case as one involving rejection of "qualified" non-minority applicants in favor of "unqualified"—or at least "far less qualified"—minority applicants. We submit that this record will not support such a thesis; it would be an error of extraordinary dimensions to decide the important constitutional issue in this case on the basis of that characterization of the record. The record here does show what the law school itself recognized when it instituted the special admissions program for minority applicants, namely, that law school admissions "qualifications" cannot be measured purely mechanistically, at least not in a profession as intensely human and personal as the law. Academic credentials

and high test scores do not necessarily make good law students, much less good law practitioners. Some of this country's most eminent lawyers and jurists came from educational and cultural backgrounds which might have produced "low" PFYA's under today's evaluative techniques. Yet no mechanical test known to man can accurately assess the qualities of judgment, character, stability and compassion needed in good lawyers and law students. Those traits demand personal evaluation. Where the applicant is an individual whose own background, education and experience may differ markedly from that of the conventional admissions officials and whose conventional test scores may not accurately predict performance, special procedures may well be necessary. The real issue in this case is whether a law school can permissibly recognize this fact and develop special admissions procedures to do something about it.

The dean of the law school testified without contradiction on the need for special evaluation of minority applications:

> "We are also aware that because of these factors [cultural disadvantage] some of our usual methods of evaluating [minority] applicants are not accurate.
>
> . . . .
>
> "Some of the indicators are not particularly good . . . they have a margin of error even as to students from the majority culture, and we know that as to students from these minority cultures, they may be even less reliable.
>
> . . . .
>
> "We set [minority applications] aside and we separately evaluate them because they present a separate kind of evaluation problem." (R. 00524-525; *see also* R. 00087-88, 00173, 00190-191, 00516).

One central fact emerges in this record. As the Washington Supreme Court itself recognized, *all* the admitted applicants—regardless of race, and regardless of admissions procedures—were judged "qualified" to complete the law school program by the admissions committee. (82 Wn.2d—, 570 P.2d 1176; Pet. App. A-12). The only way one can conclude that some minority students who were admitted were "less qualified" than other students is by forcing the question into an unrealistic and unwise framework of statistical objectivity—a reduction of the admissions process to a mechanical science of computers instead of an art of human dimensions. Neither our law schools nor our courts should fall prey to this deceptively logical measure of aptitude, especially at a time when the validity of standardized tests when used to evaluate minority individuals is widely questioned.[5]

ARGUMENT

I. TO THE EXTENT THAT RACE WAS A FACTOR IN THIS ADMISSIONS PROCESS, NO UNCONSTITUTIONAL DISCRIMINATION WAS IMPOSED.

The record here is clear that race *per se* was not the single determinative factor in admission to this law school. The process did not involve automatic admission or rejection of any applicant solely because of race. Cf. *Sweatt* v. *Painter,* 339 U.S. 629 (1950). The conclusion sustained by this record as to the role of race in this admissions process is that applicants of certain minority races went through an initial admissions screening process somewhat different than

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[5] See, *e.g., Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971); Cooper & Sobol, *Seniority and Testing under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion,* 82 HARV. L. REV. 1598 (1969).

that employed for non-minority applicants. Furthermore, even if the record is read to reach some conclusion regarding the relative "qualifications" of minority vs. non-minority applicants, the most that can be said is that some minority applicants with lower mechanical "predictions" of scholastic success were admitted while some non-minority applicants with higher prediction quotients were denied admission. The use of race here does not violate the Constitution. [6]

A. Consideration of Race for Purposes of Integration and Overcoming Historical Racial Deprivation Is Consistent With the Fourteenth Amendment and This Court's Decisions.

The history and purpose of the Fourteenth Amendment as well as this Court's decisions do not sustain the conclusion that official consideration of race is *per se* unconstitutional state action without regard to the circumstances. The first Mr. Justice Harlan's oft-quoted remark that "the Constitution is color-blind, and . . . does not . . . permit any public authority to know the race of those entitled to be protected in the enjoyment of [civil] rights," *Plessy* v. *Ferguson,* 163 U.S. 537, 554, 559 (1896) (dissenting opinion), cannot be taken out of its historical context and distorted into a rigid, mechanical rule that uncritically equates consideration of race with unconstitutional action. The Framers of the Fourteenth Amendment did not intend such a simplistic rule. Indeed if race could *never* be

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[6] For a scholarly and thorough examination of the legal, sociological, educational and practical aspects of the issues involved in this case, see O'Neil, *Preferential Admissions: Equalizing the Access of Minority Groups to Higher Education,* 80 YALE L.J. 699 (1971).

considered by governmental authority, effective implementation of the Fourteenth Amendment would be impossible.

1. The Fourteenth Amendment

The social, political and legal history of the Fourteenth Amendment is well known. Since the first colonists settled this country in the early 1600's until after the Civil War, slavery and subrogation of minorities were widespread in America. Indeed the first Americans, the Indians, were subjected to conquest, ridicule and forced isolation well into the 1890's and even today remain isolated and segregated in many ways. That unconscionable aspect of the history of the formation of this Republic, born with racial discrimination and slavery in its midst, led to civil war. That war in turn led to historic declarations of equality and the legal termination of slavery by the ratification of the Thirteenth Amendment. But neither the war nor the related constitutional amendments or enabling legislation led to immediate equality. Even today the promises of racial equality set forth by Congress more than 100 years ago have not been realized. It is unacceptable, but nonetheless true, that substantial barriers to equality remain. As recently as 1968, a presidential commission was able to state—and document—the conclusion: "Our nation is moving toward two societies, one black, one white—separate and unequal." *Report of the National Advisory Commission on Civil Disorders,* at 1. History well proves the difficulties of obtaining—through law—the ultimate goal of equality: a society in which every individual is in truth treated equally as an individual, regardless of race, creed, color, sex or national origin. The Lawyers' Committee for Civil Rights Under Law is funda-

mentally committed to the attainment of that goal at the earliest moment. We are not yet there. Until we are, programs such as that involved here are not only proper, but are necessary. Until we can honestly say that we have a society in which race is irrelevant, the Fourteenth Amendment cannot be so "color-blind" as to prohibit achievement of racial equality. "Equal protection, not color blindness, is the constitutional mandate, and the experience of liberty of contract should caution against an absolute legal criterion that ignores practical realities." Freund, *Constitutional Dilemmas,* 45 B.U.L. REV. 13, 20.

The Framers of the Fourteenth Amendment and the Reconstruction Congress were not so naive as to believe that equality was attainable solely through enactment of legal provisions declaring all are equal. They knew that eliminating racial discrimination required a process which at times would necessitate affirmative consideration of race to attain the equality so long denied. Indeed many of the same individuals who wrote the Fourteenth Amendment participated in the passage of legislation creating the Freedman's Bureau in 1865, Act of Mar. 3, 1865, 13 Stat. 507. Although "[t]he Bureau's work was not confined to Negroes," S. MORISON, THE OXFORD HISTORY OF THE AMERICAN PEOPLE 711 (1965), its primary purpose and design was to aid emancipated slaves facing the "burdens" of freedom. Passage by Congress of one of the so-called "Indian Preference Acts," § 6 of the Act of May 17, 1882, 22 Stat. 88, 25 U.S.C. § 46, also suggests that the contemporary view of the Congress was not to eliminate every consideration of race in government action regardless of consequence or intent. That statute, which mandates that preference be given to

Indians in hiring clerical, mechanical and other help on reservations and by Indian agencies, would have been impossible under the "color-blind" theory advanced by some briefs in this case.[7]

The Fourteenth Amendment was intended "to eliminate the degrading concomitants as well as the bare fact of chattel slavery." Hyman, *Segregation and the Fourteenth Amendment,* 4 VAND. L. REV. 55 (1951). Elimination of the badges of slavery required consideration of race then and in some cases it requires consideration of race now. Hopefully, some day, such consideration will be unnecessary.

2. This Court's Decisions

This Court has recognized that the Fourteenth Amendment envisions a process for attaining equality, not a static standard forever precluding any consideration of race. As this Court stated in *Palmer* v. *Thompson,* 403 U.S. 217, 220 (1971), "History shows that the *achievement of equality* for Negroes was the urgent purpose . . . for passage of the Fourteenth Amendment. . . ." (emphasis added). Until that equality is achieved, the purpose will not be fulfilled.

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[7] We recognize that technically the Freedman's Bureau and Indian preference laws represented *federal* legislation while the Fourteenth Amendment is restricted to *state* action. But certainly the post-Civil War Congress would not have passed those race-conscious acts if they truly believed the Fourteenth Amendment prohibited *any consideration* of race by the States. Those Congressmen, like this Court in 1896, undoubtedly recognized "that the Constitution of the United States in its [then] present form, forbids, so far as civil and political rights are concerned, discrimination by *the general government or by the states,* against any citizen because of his race." *Gibson* v. *Mississippi,* 162 U.S. 565, 591 (1896) (emphasis added).

In its first opinion interpreting the Fourteenth Amendment, this Court recognized the central purpose of that provision: "The existence of laws in the states where the newly emancipated Negroes resided, *which discriminated with gross injustice and hardship against them as a class* was the evil to be remedied by this clause. . . ." *Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36, 81 (1873) (emphasis added). Yet the Court has carefully eschewed any formulation of the Fourteenth Amendment that would prohibit the official consideration of race involved in this case. Indeed, commentators have stated that racial classifications *favoring* minority groups, rather than discriminating against them, are not unconstitutional. Professor Freund, for example, has suggested that no constitutional issue is raised by admissions programs designed to benefit the "disadvantaged segment of the community, whether economically, educationally, or politically." P. FREUND, ON LAW AND JUSTICE 44 (1968). Another writer has argued on a broader plane:

> "[T]he function of equal protection . . . is to shield groups or individuals from stigmatization by government. Whether or not particular legislation stigmatizes is largely a sociological question requiring consideration of the structure and history of our society as well as examination of the statute itself. Legislation favoring Negroes, then, would be constitutional because it is rational and because in our society it would not stigmatize whites." Wright, *The Role of the Supreme Court in a Democratic Society—Judicial Activism or Restraint?*, 54 CORNELL L.Q. 1, 18 (1968).

This Court has itself held that race can be considered in educational planning, at least where desegregation of facilities is involved. In *Swann* v. *Charlotte-*

Mecklenburg Board of Education, 402 U.S. 1 (1970), the Court approved a pupil transportation plan that relied extensively on race—and race alone—in determining school assignments. The Court recognized the practical realities of educational equality and the permissibility of racial assignments among schools, even when judicially-ordered desegregation was not involved:

> "School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court." 402 U.S. 16.

This case cannot therefore be decided simply by isolating the fact that applicants of minority races were treated differently. Racial classification is not *per se* unconstitutional without regard to the circumstances.[8]

The decisions of this Court striking down consideration of race by governmental authorities have involved certain characteristics not found in this case. The clearest unconstitutional use of race occurs when the

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[8] As one federal appellate court has put it, "Consideration of race is necessary to carry out the mandate in *Brown* . . . . Where its use is to insure against, rather than to promote deprivation of equal educational opportunity, we cannot conceive our courts would find that the state denied equal protection to either race by requiring its school boards to act with awareness of the problem." *Offerman* v. *Nitkowski*, 378 F.2d 22, 24-25 (2d Cir. 1967).

government singles out one race and imposes sanctions or deprivations of liberty. See, *e.g.*, *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886); but cf. *Korematsu* v. *United States*, 323 U.S. 214 (1944). Other cases involve state-compelled segregation of races, *e.g.*, *Brown* v. *Board of Education*, 347 U.S. 483 (1954). Next are cases in which the state encourages or facilitates private racial segregation, perhaps on pain of criminal sanction, *e.g.*, *Loving* v. *Virginia*, 388 U.S. 1 (1967); *McLaughlin* v. *Florida*, 379 U.S. 184 (1964). Finally there are the laws which encourage private racial discrimination or impose stigmas on individuals, *e.g.*, *Anderson* v. *Martin*, 375 U.S. 399, 402 (1964) (statute requiring racial identification on ballots held unconstitutional because the state might thereby "encourage its voters to discriminate upon the grounds of race"); *Hunter* v. *Erickson*, 393 U.S. 385 (1969) (requiring a referendum on a fair housing ordinance held to place special burdens on minorities and facilitate discrimination); *Strauder* v. *West Virginia*, 100 U.S. 303, 308 (1879) (unconstitutional to "brand upon [blacks] an assertion of their inferiority" by excluding them from juries).

Each of these cases involve one of two elements: either maintenance of racial segregation or imposition of a recognizable psychological stigma or badge of inferiority. Neither of those factors is present here. Washington's law school admissions program was intended to—and will—promote an integrated society. It cannot be seriously contended that the "excluded" non-minority applicants were stigmatized or branded as inferior because of their race.

B. This Racial Classification Is Not "Invidious" and Is Supported by a "Compelling State Interest."

The court below held that the admissions procedure was not an unconstitutional racial classification. Racial classifications are normally "suspect" and consideration of their constitutionality involves two subquestions: (1) is the racial classification "invidious;" and (2) is the classification rationally related to a "compelling" state interest. *Cf., O'Neill, op. cit. supra,* at 711-18.

1. This Classification Is Not Invidious.

In a recent application of the "race-as-a-suspect-category" analysis, this Court again noted, "[t]he clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of *invidious* racial discrimination," *Loving* v. *Virginia,* 388 U.S. 1, 10 (1967) (emphasis added). Throughout a long line of cases that critical adjective has been repeated. The dictionary defines the term as meaning "detrimental to reputation . . . full of envious resentment," WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1190 (1966). This Court itself expressed the same meaning in *Brown* v. *Board of Education, supra,* when it noted the inevitable stigma imposed on the minority by racial segregation:

> "To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." *Id.* at 494.

So viewed, the effect of the classification involved here is not invidious:

> "A preferential admissions system for minority group students is clearly not a form of "invid-

ious" discrimination as that test has been defined by the courts. The goal of preferential admissions is not to separate the races, but to bring them together. Moreover, no conduct is made criminal, so that the precedents which have struck down state statutes where race has been an element of criminality are irrelevant. But even more important than the obvious differences between the goal of a preferential admissions system and the goals the Court has in the past found to be impermissible or invidious are the differences in the effect of such a system. Preferential admissions do not represent a covert attempt to stigmatize the majority race as inferior; nor is it reasonable to expect that a possible effect of the extension of educational preferences to certain disadvantaged racial minorities will be to stigmatize whites." O'Neil, *Preferential Admissions, supra,* at 713.

2. Attaining Racial Equality in Education Is a "Compelling" State Interest.

The central importance of racial equality in education is obvious and has repeatedly been recognized by this and other courts. Indeed the importance of equal education has been a sufficient factor to justify judicially-decreed affirmative consideration of race. *E.g., Swann, supra; Wanner* v. *School Board of Arlington County,* 357 F.2d 452, 454 (4th Cir. 1966); *Offerman* v. *Nitkowski,* 378 F.2d 22 (2d Cir. 1967). The goal of equality is especially important in legal education. Racial integration of law school student bodies furthers important societal interests as this Court has itself noted:

"Although the law is a highly learned profession, we are well aware that it is an intensely practical one. The law school, the proving ground for legal learning and practice, cannot be effective in isola-

> tion from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vaccum, removed from the interplay of ideas and the exchange of views with which the law is concerned." *Sweatt* v. *Painter, supra,* at 634.

The Washington Supreme Court here correctly analyzed the "compelling state interest" issue:

> "The legal profession plays a critical role in the policy making sector of our society, whether decisions be public or private, state or local. That lawyers, in making and influencing these decisions, should be cognizant of the views, needs and demands of all segments of society is a principle beyond dispute. The educational interest of the state in producing a racially balanced student body at the law school is compelling.
>
> Finally, the shortage of minority attorneys—and, consequently, minority prosecutors, judges and public officials—constitutes an undeniably compelling state interest. If minorities are to live within the rule of law, they must enjoy equal representation within our legal system." 82 Wn. 2d at—, 570 P.2d at 1183-84, Pet. App. A-26.

Within the past few months a presidential commission has concluded that in spite of recent efforts to overcome racial discrimination in higher education, an equal opportunity to attend college is still not available to racial and ethnic minorities. NATIONAL COMMISSION ON THE FINANCING OF POSTSECONDARY EDUCATION, FINANCING POSTSECONDARY EDUCATION IN THE UNITED STATES (1973). That finding highlights the continued need for special admissions procedures such as the one involved here.

The special admissions procedure employed for minority applicants is a rational means of achieving the desired goal of educational equality. The University of Washington Law School officials reasonably concluded that traditional admissions procedures did not adequately evaluate minority applicants; they designed a system which could reasonably be expected to attain more accurate evaluations. That system employed individual review of minority applicants by persons familiar with the problems of those applicants and able to gain insight into true ability. It is not irrational to conclude that special cases need special consideration. See *Reed* v. *Reed*, 404 U.S. 1, 75 (1971); *Tigner* v. *Texas*, 310 U.S. 141, 147 (1940). Nor is it irrational to conclude that today's educational tests and majority-oriented college programs do not predict law school performance as accurately for the minority applicant as they do for the non-minority applicant.

II. THE ARGUMENTS ADVANCED AGAINST THE DECISION BELOW ARE NOT PERSUASIVE.

Petitioners and the amici supporting their position advance varied attacks on the decision below. None are persuasive.

A. Petitioners Have Failed To Prove That the PFYA Standard Should Be the Only Measure of Law School Admissions.

The central thesis of petitioners' argument—as well as the basic assumption of the trial court's findings—proceeds from an analysis of law school admissions based solely on grades and tests. One commentator foresaw the thrust of this argument against minority admissions programs at law schools. It is based, he wrote, on a "leap from the undeniably correct premise

that students incapable of doing law school work should not be admitted to law school, to the wholly erroneous conclusion that law schools can and should determine student capability on the basis of undergraduate grades and LSAT scores. It assumes that through utilization of such criteria, admissions officers will unerringly select the best and most qualified applicants. This has never been the case." Bell, *In Defense of Minority Admissions Programs: A Response to Professor Graglia,* 119 U. PA. L. REV. 364, 366 (1970).

This "test-and-grade" approach is not only factually erroneous, but has been rejected as a matter of law by this Court in an analogous context. In *Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971), the Court held, without dissent, that employment testing or measuring procedures could not be given controlling force in hiring if the effect was to exclude minority applicants unless those tests "are demonstrably a reasonable measure of job performance." *Id.* at 436. Recognizing that inferior education in the formative years leads to lower performance on intelligence and ability tests in later years, *id.* at 430, the Court placed on the proponent of ability testing the burden of showing that the tests used were accurate in their predictions and therefore not racially discriminatory.

Although *Griggs* involved a statutory question concerning § 703 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, the analysis used there is equally applicable here. Where utilization of ability tests has the effect of excluding minority applicants, those tests become themselves "suspect" and the proponent of relying solely on testing bears the burden. Since it is the petitioners who seek here to base admissions solely on tests and grades, it is *their classification* that is "suspect," not that of the law school.

The record in this case justifies the respondents' conclusion that utilization of grade and LSAT scores alone results in exclusion of minority students. According to a study of the American Bar Association's Section of Individual Rights and Responsibilities (Def. Ex. 7), approximately 2.7% of the students enrolled in law schools throughout the Nation in 1969-70 were black. Even that statistic can be misleading unless one notes that in the same year an estimated fifty law schools of the roughly 140 schools approved by the ABA enrolled 90% of all minority students. ASSOCIATION OF AMERICAN LAW SCHOOLS, THE LAW SCHOOLS AND MINORITY GROUP STUDENTS, 12 (1970). Low percentages of minority students go hand in hand with high reliance on LSAT scores and grade averages. Schools which have obtained higher numbers of minority students have done so by giving less emphasis to such test scores. *See, e.g.,* Fleming & Pollack, *The Black Quota of Yale Law School—An Exchange of Letters,* 19 THE PUBLIC INTEREST, 44, 50-51 (1970). The debate over "cultural bias" in the LSAT is widespread and has resulted in numerous discussions as well as studies by LSAT officials themselves. LSAT ANNUAL COUNCIL REPORT 201-02 (1970). In this context petitioners' advocacy of "quality" admissions standards must be viewed with the same legal skepticism invoked in *Griggs.* The Burden is on the petitioners; the burden has not been met.

Petitioners' advocacy of "quality" legal education without any special consideration for racial minorities is at this point in history similar to the position rejected last month by the Court in *Lau* v. *Nichols,* 42 U.S.L.W. 4165 (Jan. 21, 1974) (No. 72-6250). There a unan-

imous Court held that the failure of the San Francisco school system to provide English language instruction to children of Chinese ancestry denied them equal educational opportunity in violation of § 601 of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d). The core of that opinion is a recognition that equal educational opportunity does not come simply as a result of objectively equal standards or curricula for all, regardless of individual circumstances. Although the obvious denial of equality in failing to provide means of eliminating language barriers may at first glance seem distinguishable from the failure to tailor admissions procedures to the special circumstances of minority students, the difference is only one of subjective sensitivity to the actual existence of discrimination. The University of Washington Law School reasonably concluded that special procedures for minorities were needed. It should not be stopped from doing what San Francisco failed to do by not treating different students differently.

B. Proven Existence of Prior Racial Discrimination Is Not an Essential Prerequisite to Affirmative Consideration of Race.

Some of the briefs filed in this case urge that race can only be considered where a prior history of race discrimination is proven. That position is not only contrary to common sense—for it precludes voluntary correction of deficiencies—it is inconsistent with the precedents. A finding of prior racial discrimination is necessary for a court to *order* affirmative racial action, but that is not the issue here. It is not contended that the University of Washington Law School was *required* to consider race as one factor in the admissions process, rather the issue is whether the Constitution *permits* the school so to decide. This

Court has noted the difference in *Swann* where it held that racial balance could voluntarily be adopted as a goal by local education authorities, but could not be ordered by a federal court "absent a finding of constitutional violation." *Swann, supra,* 402 U.S. at 16.

Cases in the federal appellate courts make clear that prior racial discrimination is not a necessary foundation for voluntary state action seeking racial equality. *Porcelli* v. *Titus,* 431 F.2d 1254 (3rd Cir. 1970), *cert. denied,* 402 U.S. 944, (1971), is instructive. There the Newark school authorities voluntarily adopted a policy for promotion and selection of principals and vice-principals which deliberately took into consideration the race of the teacher. The court of appeals rejected a constitutional challenge to that plan without requiring a finding of prior racial discrimination in faculty hiring or promotions. Indeed the district court had explicitly declined the invitation of the intervenors to find that prior "promotional examinations were conducted in such a way as to discriminate against Negroes." *Porcelli* v. *Titus,* 302 F. Supp. 726, 736 (D.N.J. 1969).

The Second Circuit Court of Appeals has also noted that a finding of prior racial discrimination is not essential to voluntary state efforts to achieve equality. In *Norwalk CORE* v. *Norwalk Redevelopment Agency,* 395 F.2d 920 (1968), that court reviewed a complaint challenging urban renewal practices and held that the alleged failure to consider relocation of minority residents required a full evidentiary hearing. There the court said:

> "What we have said may require classification by race. That is something which the Constitution usually forbids, not because it is inevitably an impermissible classification, but because it is one which usually, to our national shame, has been

drawn for the purpose of maintaining racial inequality. Where it is drawn for the purpose of achieving equality it will be allowed, and to the extent it is necessary to avoid unequal treatment by race, it will be required." 395 F.2d at 931-32 (footnotes omitted).

The relevant precedents recognize that voluntary affirmative action to obtain racial equality is permissible even if there has been no finding of prior racial discrimination.[9]

C. It Is Not Necessary To Draw the Classification on the Basis of Cultural, Educational or Economic Deprivation.

It has been suggested that the admissions program in question might be valid if cultural, economic or educational deprivation rather than race was used as the identifying factor for special consideration. The suggestion is not persuasive.

The problem addressed by the respondents was one of racial imbalance. That problem could be met only through considerations of race. But race was only a starting point and not the dispositive factor resulting in automatic admission. Race may have identified those applicants justifying special evaluation, but ability to perform in law school and contribution to the school and the community were the determining considerations.

The practical impossibility of using educational, cultural or economic deprivation as the factor indi-

[9] It cannot be assumed that no prior racial discrimination existed at the University of Washington Law School. The record here is inadequate to support that or a contrary conclusion. We are informed by an associate dean of the University of Washington Law School that of the 3,812 students graduated between 1901 and 1970, 12 were black. That statistic could itself "prove" discrimination in other contexts. Cf. *Turner* v. *Fouche*, 396 U.S. 346 (1970).

cating special evaluation was recognized by the trial court itself:

> "The way I looked at the evidence in this case was that to take a thousand Afro-American students and determine all that has happened to each one and then make a separate finding as to each one as to whether he was deprived in his childhood would be a very burdensome task; so that as I see it, the admissions committee just took, for example, the Black students and said these will be considered separately by the law school and by the professor interested in that program, and it was assumed that every Black student was a deprived person." (R. 00555).

Moreover, even if the administrative burdens could be overcome, the limited facilities and resources available for legal education prevent meaningful attempts to meet the problems of all cultural, economic or educational deprivation. *See,* O'Neil, *supra,* at 746-47. The law school chose to attack one area of recognized educational inequality. It should not be constitutionally restrained because it did not pick some other area or quixotically try to eliminate all educational inequality.

III. REVERSAL OF THE DECISION BELOW WOULD IMPERIL THE VIABILITY OF AFFIRMATIVE ACTION PROGRAMS.

It has been suggested that the decision below can be reversed without impairing other "affirmative action" programs. We disagree. In our judgment a reversal by this Court would jeopardize the vitality of school integration plans, Title VII employment programs, and other forms of affirmative action. Equally important, reversal here could lead to increased judicial dependence on the deceptively difficult distinction of *de jure-de facto discrimination.*

Elimination of racial discrimination nationwide—root and branch—is a hard task. In retrospect the early cases now seem simple and obvious. But elimination of facially discriminatory laws, as this Court well knows, did not produce overnight equality. Indeed more than fifteen years after *Brown,* desegregation of public schools still had not been achieved. Despite this Court's imperative in *Alexander* v. *Holmes County Board of Education,* 396 U.S. 19 (1969), the job remains far from finished. This Court has witnessed the evasive devices of "freedom of choice." *Green* v. *County School Board,* 391 U.S. 430 (1968), "local control," *Wright* v. *Council of City of Emporia,* 407 U.S. 451 (1972), and "boundary adjustment by states", *United States* v. *Scotland Neck City Bd. of Ed.,* 407 U.S. 484 (1972). The invocation of "qualifications" and "objective testing" has also been considered. *Griggs, supra.* The ultimate lesson of history is clear: elimination of racial discrimination and achievement of true equality is a hard job. The modes of masking discrimination are subtle and elusive. Implementing a "plan that promises realistically to work, and promises realistically to work *now," Green, supra,* at 439, frequently requires consideration of race—not just in school desegregation cases, but in other areas as well.

The experience of federal officials in attempting to eliminate job discrimination is typical. Congress tried to deal with the problem in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) *et seq.* Practical implementation proved what we already know—a simple proscription on racial discrimination was not enough. Executive Orders were issued requiring "affirmative action." *E.g.,* Ex. Ord. 11246, 30 Fed. Reg.

12319, as amended (1965). This concept subsequently took the form of commitments to obtain percentages of minority employees within a predetermined range. Those goals necessarily involved affirmative consideration of the race of the applicant. *See, e.g., Contractors Associatiton of Eastern Pa.* v. *Secretary of Labor,* 442 F.2d 159 (3rd Cir.), *cert. denied,* 404 U.S. 854 (1971).

Realistic, workable affirmative action programs must be able to take race into account. At some point or other, existing programs do use race. Forcing all state-supported affirmative action programs to be rigidly "color-blind" can only have one of three undesirable results: (1) the programs cannot function; (2) the programs will be limited to the South and other areas where past discrimination can be judicially "proven;" or (3) courts and other government officials will resort to self-deceptive labels or procedures to insulate their actions from judicial invalidation. None of these results, we submit, is acceptable.

CONCLUSION

A generation ago, in *Missouri ex rel Gaines* v. *Canada,* 305 U.S. 337, 351 (1938)—a decision viewed by many as a turning point in civil rights adjudications—this Court indicated segregated legal education had no place in American society. Twelve years later that indication became clear law and the Court held in *Sweatt* v. *Painter* that "white only" law schools were unconstitutional. Now, twenty-four years after *Sweatt,* legal education remains to a high degree open only to the privileged majority. History, experience and this record show that without special admissions programs such as that under review we will not likely achieve equal legal educational opportunities for racial

minorities. The promise of *Sweatt* is just now being fulfilled by Washington and the other law schools that have chosen to recognize past inequality and do something affirmatively about it. That promise should not be broken. The decision below should be affirmed.

Respectfully submitted,

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